L'Escargot Cafe Restaurant (M) Sdn Bhd v Far East Consortium (M) Ltd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1–22–1088 OF 2002
KANG HWEE GEE J
28 FEBRUARY 2008

Contract — Breach — Condition — Tenancy agreement — Renting of space to be used as restaurant at defendants' condominium — Landlord had represented that all relevant building plans and approval had been obtained — Whether landlord in breach when tenant told to vacate place by DBKL by reason that space had not been approved as restaurant — Whether relevant that DBKL might be at fault in failing or refusing to designate space as 'restaurant' and had on that ground denied tenant business licence

Landlord and Tenant — Agreement — Construction — Renting of space to be used as restaurant at defendants' condominium — Tenant had no business licence before commencing operation of restaurant — Tenant denied business licence as space not designated as 'restaurant' — Whether landlord in breach

The plaintiff and the second defendant had entered into and executed a tenancy agreement on 1 December 1997 in respect of a space to be used as a restaurant at the defendants' condominium. The first defendant was the developer of the condominium. At the time when the agreement was entered into with the second defendant, the premise was still uncompleted. When the building was completed and after the issuance of certificate of fitness the plaintiff went about to renovate and prepare the said premises for its intended purpose of operating a French restaurant. The plaintiff commenced business in the early part of 1998 but had to move out of the premises and abandoned its business in August 1998 after receiving a notice dated 5 August 1998 from Dewan Bandaraya Kuala Lumpur ('DBKL') by reason that the plaintiff had no development order and had not changed the use of the space as a restaurant. The plaintiff contended that prior to entering into the agreement the defendants had represented to the plaintiff that they had obtained all the relevant building plans and approval necessary for the said premises to be used for operating a restaurant. The defendant argued that the notice by DBKL informing the plaintiff that it had to stop operating the restaurant did not make sense. The defendants had obtained the development order way back on 14 June 1993 and had amended the plan to restaurant on

27 February 1998. The defendant also argued that the plaintiff had not obtained the relevant licence to commence its business and thus was in breach of the tenancy agreement and the by laws governing the operation of the business of a restaurant. The plaintiff argued that the second approved plan as amended now stated 'restaurant' at the area where previously stated as 'kitchen and lounge'. This amended plan was approved only on 28 May 1999. Therefore at the time the plaintiff terminated the contract in August 1998 there was not in existence an approved plan for restaurant.

Held:

(1) A contract is essentially a bargain with commercial elements — an exchange of something for something. The plaintiff had entered into a bargain on the term and condition that the place could be used to operate a licensed restaurant (see para 32).

(2) The plaintiff had the right to what it bargained for regardless of whether DBKL had rightly or wrongly refused to approve the space as a restaurant. The fact that DBKL might have been at fault in failing or refusing to designate the space as a 'restaurant' and had on that ground denied the plaintiff the business licence, was therefore irrelevant (see para 33).

(3) Whereas obtaining a licence from DBKL to operate the restaurant as a business was the obligation of the plaintiff as tenant, the obligation of the defendants as landlord was to ensure that the plaintiff was able to use that space for its restaurant business without let or hindrance. This envisaged that the space should have been pre-approved by DBKL for use as a restaurant before it was let out to the plaintiff (see para 35).

(4) It was clear from the notice that the plaintiff received from DBKL dated 5 August 1998 following the plaintiff's application for a business licence from DBKL to operate the restaurant, that DBKL had not approved the space for use as a restaurant. Consequently, the plaintiff was unable to use that space as a restaurant. The defendants had therefore breached a condition of the tenancy agreement in failing to provide the plaintiff with the space for the purpose to operate the restaurant. A breach of a condition (as opposed to a mere breach of a warranty) of a contract goes to the very root of the contract to allow the plaintiff to discharge the contract (the tenancy agreement in this case) and to claim damages (see paras 36–37).

[Bahasa Malaysia summary

Plaintif dan defendan kedua telah memasuki satu perjanjian penyewaan pada

1 Disember 1997 berhubungan dengan satu ruang yang akan digunakan sebagai sebuah restoran di kondominium defendan-defendan. Defendan pertama adalah pemaju kondominium tersebut. Pada masa perjanjian dimasuki dengan defendan kedua, premis tersebut masih belum disiapkan. Apabila bangunan tersebut siap dan selepas pengeluaran sijil penghunian plaintif telah mengubahsuai dan menyediakan premis tersebut untuk tujuan menjalankan satu restoran Perancis. Plaintif menjalankan perniagaan tersebut di permulaan 1998 tetapi terpaksa keluar daripada premis tersebut dan meninggalkan perniagaannya pada Ogos 1998 selepas menerima notis bertarikh 5 Ogos 1998 daripada Dewan Bandaraya Kuala Lumpur ('DBKL') yang disebabkan kerana plaintif tiada perintah pembangunan dan tidak menukarkan penggunaan ruang tersebut kepada restoran. Plaintif menegaskan bahawa sebelum memasuki perjanjian tersebut, defendan-defendan telah membuat representasi bahawa plaintif telah memperoleh segala pelan-pelan bangunan yang relevan dan kebenaran yang perlu untuk premis tersebut digunakan untuk tujuan menjalankan perniagaan sebuah restoran. Defendan menyatakan bahawa notis daripada DBKL memaklumkan kepada plaintif untuk memberhentikan perniagaannya sebagai sebuah restoran tidak masuk akal. Defendan-defendan telahpun memperoleh perintah pembangunan semenjak 14 Jun 1993 dan telah meminda pelan tersebut kepada restoran pada 27 Februari 1998. Defendan juga menghujahkan bahawa plaintif telah tidak memperoleh lesen yang relevan untuk memulakan perniagaannya dan dengan itu telah melanggar perjanjian penyewaan dan undang-undang kecil yang mengawal operasi perniagaan restoran. Plaintif menghujahkan bahawa kebenaran pelan kedua yang terpinda sekarang menyatakan 'restoran' di kawasan tersebut di mana sebelum ini ia menyatakan 'dapur dan lounge'. Pelan yang terpinda hanya diluluskan pada 28 Mei 1999. Dengan itu apabila plaintif menamatkan kontrak pada Ogos 1998 tiada wujudnya satu pelan yang telah diluluskan untuk sebuah restoran.

Diputuskan:

(1) Sesuatu kontrak adalah pada dasarnya satu janji dengan elemen komersial — satu pertukaran untuk sesuatu bagi sesuatu yang lain. Plaintif telah memasuki kepada satu perjanjian atas terma dan syarat bahawa tempat tersebut dapat digunakan untuk menjalankan satu restoran yang berlesen (lihat perenggan 32).

(2) Plaintif mempunyai hak kepada apa yang dijanjikan kepadanya tidak kira sama ada DBKL telah secara betul atau salah enggan meluluskan ruang tersebut sebagai restoran. Fakta bahawa DBKL berkemungkinan bersalah dalam kegagalannya atau keengganannya memperuntukkan

ruang tersebut sebagai sebuah 'restoran' dan telah atas alasan tersebut menafikan plaintif dengan lesen perniagaan, adalah dengan ini tidak relevan (lihat perenggan 33).

(3) Walaupun pemerolehan lesen daripada DBKL untuk menjalankan perniagaan sebuah restoran adalah obligasi plaintif sebagai penyewa, obligasi defendan-defendan sebagai tuan tanah adalah untuk memastikan plaintif dapat menggunakan ruang tersebut untuk perniagaan restorannya tanpa sebarang sekatan. Ini menggambarkan ruang tersebut sepatutnya telah diluluskan terlebih dahulu oleh DBKL untuk kegunaan sebagai sebuah restoran sebelum ia disewakan kepada plaintif (lihat perenggan 35).

(4) Ia adalah jelas daripada notis yang diterima plaintif daripada DBKL bertarikh 5 Ogos 1998 berikutan dengan permohonan plaintif untuk lesen perniagaan daripada DBKL untuk menjalankan restoran tersebut, bahawa DBKL telah tidak meluluskan ruang tersebut untuk kegunaan sebagai sebuah restoran. Akibat dari itu, plaintif telah tidak dapat menggunakan ruang tersebut sebagai sebuah restoran. Defendan-defendan dengan itu telah melanggar satu syarat di perjanjian penyewaan dalam kegagalan mereka memberikan plaintif ruang tersebut untuk tujuan menjalankan perniagaan restoran. Satu perlanggaran syarat (tidak seperti satu perlanggaran sesuatu waranti) sesuatu kontrak menjejaskan akar umbi kontrak tersebut membenarkan plaintif menamatkan kontrak tersebut (dalam kes ini perjanjian penyewaan tersebut) dan menuntut ganti rugi (lihat perenggan 36–37).]

Notes

For cases on condition of breach of contract, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2562–2567.

For cases on construction of agreement, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1–3.

Legislation referred to

Rules of the High Court 1980 O 18 r 22

S. Muralitharan (Bodipalar Ponnudurai Nathan) for the plaintiff.

Joseph Iruthayam (Kumari with him) (Joseph Iruthayam & Co) for the defendant.

Kang Hwee Gee J:

[1] The suit involves only the construction of a clause in the tenancy agreement which the plaintiff had entered into with the defendants respecting a space to be used as a restaurant at the defendants' condominium.

A **[2]** At my behest, the parties are agreed that in the interest of expediency the trial be proceeded with without pleading pursuant to O 18 r 22 of the Rules of the High Court 1980 based on the following summary of agreed facts:

B SUMMARY OF AGREED FACTS

[3] Tenancy agreement on 1 Disember 1997 ('tenancy agreement') in respect of a premise known as C1-03 and C1-03A, 1st Floor, Block C, Puncak Prima, Jalan Sri Hartamas, 50480 Kuala Lumpur ('the premises'). **C** The 1st defendant is the developer of the building called Puncak Prima in which the demised premise was situated. The second defendant is the landlord of the premises.

D **[4]** The relevant clause of the tenancy agreement for the purpose of this trial is as follows:

> Section 6.05 Approvals, Licensing and Renewal
>
> The Tenant shall comply with observe at all times all such rules, regulations and **E** conditions imposed by the relevant authorities in respect of such licence permit and consent (hereinafter referred to as 'the said Licence') granted for the operation of the business by the Tenant. The Tenant shall apply for including the renewal of the said Licence, the cost and expense of which including the fees imposed for such application and renewal and all such charge and costs incidental thereto shall be borne absolutely by the Tenant. The Tenant hereby agrees to indemnify and keep **F** the Landlord indemnified against all claims, losses, fines, penalties, impositions, damages or whatsoever payments suffered or incurred by the Landlord resulting or arising from any breach or non observance by the Tenant or any of its servants or agents of any laws, by laws, rules, regulations or orders imposed by the relevant authority in connection with its business.

G

[5] At the time when the agreement was entered into with the second defendant, the premise was still uncompleted.

H **[6]** When the building was completed and after the issuance of certificate of fitness the plaintiff went about to renovate and prepare the said premises for its intended purpose of operating a French restaurant. The plaintiff commenced business in the early part of 1998.

I **[7]** It moved out of the premises and abandoned its business in August 1998 after receiving a notice dated 5 August 1998 from Dewan Bandaraya Kuala Lumpur ('DBKL')

[8] The notice read as follows:

A NO.8706

AKTA 267

AKTA (PERANCANGAN) WILAYAH PERSEKUTUAN, 1982

NOTIS PENGUATKUASAAN

Bil Surat Kami: (10) dlm. DBKL JP & KB1167/98/2A

Kepada:

Pengguna

Pengarah Utusan, L'escargot Café Restaurant (M) Sdn. Bhd.

C1-03, Tingkat Satu, Puncak Prima Kondominium,

Jalan Sri Hartamas 17, 50480 Kuala Lumpur.

05 AUG 1998

1. Bahawasanya Datuk Bandar Kuala Lumpur adalah berpuashati bahawa tuan/puan telah memulakan atau menjalankan pertukatran penggunaan tanah atau bangunan tuan/puan di atas Lot No 48627 Mukim Kuala Lumpur Premis No C1-03, Tingkat Satu, Puncak Prima Kondominium, Jalan Sri Hartamas 17 dalam Wilayah Persekutuan Kujala Lumpur,

(a) ...;

(b) ...;

(c) tanpa Perintah Pembangunan;

(d) ...;

(e) ...;

(f) ...;

2. ADALAH DIBERITAHU bahawa tuan/puan adalah dikehenddaki supaya memberhenti dan memindahkan kegunaan sebagai restoran tanpa Perintah Pembangunan yang dijalankan atas nama 'L'escargot Café Restaurant (M) Sdn. Bhd.' di premis C1-03, Tingkat Satu, Puncak Prima Kondominium, Jalan Sri Hartamas 17, di atas Lot 48627 Mukim Kuala Lumpur, Kuala Lumpur.

3. ADALAH DIBERITAHU bahawa tuan/puan adalah diberi 14 hari untuk mematuhi notis ini daripada tarikh notis ini disampiakan dan sekiranya tuan/puan tidak mematuhi kehendak-kehendak notis penguatkuasaan ini dalam tempoh yang ditetapkan maka tuan/puan adalah melakukan kesalahan dan boleh apabila disabitkan kesalahan dikenakan denda tidak lebih daripada $20,000 (dua puluh ribu ringgit).

tt

ABD. RAHIM BIN HAJI YAAKOB

Pegawai Perancang Bandar dan Desa Jabatan

Perancang & Kawalan Bangunan

Dewan Bandar Kuala Lumpur.

b/p Datuk Bandar

Kuala Lumpur.

THE CASE FOR THE PLAINTIFF

[9] Plaintiff contends that prior to entering into the agreement the defendants had represented to the plaintiff that they had obtained all the relevant building plans and approval necessary for the said premises to be used for operating a restaurant. The said representation was made orally by a representative of the defendants one Ms CC Chew that all building plans had been approved for the operation of the restaurant and that they did not foresee any problem of obtaining a licence to operate the restaurant.

[10] Pursuant to the representation the plaintiff on 8 September 1997 (after certificate of fitness) wrote to the 1st defendant's company secretary requesting inter alia, (see para 1) for the approved plans of the premises in order to enable the plaintiff to apply for a licence to operate the restaurant. The letter read as follows:

September 8th 1997

Thiang Siew Eng

7 Jalan BU 1/14

Bandar Utama

47800 Petaling Jaya

Selangor.

Ms. Ho Yen Min

Company Secretary

Far East Consortium (M) Ltd.

12th Floor, Menara Multi-Purpose

Capital Square

8 Jalan Munshi Abdullah

50100 Kuala Lumpur.

Dear Ms Ho,

Re: Responses to my queries

During my last meeting with you in August, several matters were brought up and I would

very much appreciate some immediate answers so that I may proceed with my renovation plans and setting up the restaurant.

1. I need the approved plans of Puncak Prima so that I may submit my business licence application/transfer to DBKL.

2. My request that I be permitted to use the exit door next to the tennis court as another entrance into the restaurant. I need an answer in order to finalize my design plans.

3. When will Far East be hacking the wall to create the entrance to the first floor restaurant?

4. During a meeting of the tenants with Mr TC Woo sometime back in July or early August, he mentioned the possibility of granting the restaurants the use of one floor of parking for our customers. What is the status of that?

5. During the same meeting with Mr. Woo, the issue of the cost of the exhaust system to be borne by Far East was brought up as well by the restaurant and cafeteria tenants as this was promised by the marketing personnel when we signed up.

6. The tenants were told that a signboard will be erected along the main road. The purpose of this signboard is to advertise the various businesses that are in Puncak Prima. Who will bear the fees for the signboard licence if such fees are applicable?

7. In my temporary agreement signed last year with Far East, a clause was added that the cafeteria's menu not be in conflict of that of L'escargot Cafe Restaurant. It stated specifically that the cafeteria will not be allowed to serve any Western food (e.g. lamb chop, chicken chop). At that time, Far East's marketing personnel promised that there will not be any menu conflict with the cafeteria.

It has come to my attention that the cafeteria will indeed be serving Western food. How and what can Far East do in this case? A menu conflict will not be in anyone's interest.

8. Another issue is that of maintenance fees. This fee was never ever mentioned in the temporary agreement. Only the rental rates were quoted to us. It came as a shock when I went through the agreement. Why should we have to pay maintenance fees?

9. I have been to the site a number of times and have noticed that the walls are dirty. I request that a fresh coat of paint be given. If at all possible, I would like the paint work to be done after my masonry work.

10. The amendments to the lease agreement which you agreed to. I would like to have a copy of the amended agreement.

I appreciate you taking your time and effort to attend to these matters especially when a lot of the issues are not in your area of work. It has been a most frustrating time trying to get some answers or responses to my queries and it is good to see some one taking accountability to get back with some answers.

Thank you again.

A Yours sincerely,

Sgd.

Thiang Siew Eng

B **[11]** The plaintiff then applied by letter dated 5 November 1997 for a licence to DBKL to operate the restaurant having been supplied with a copy of the approved plans requested for.

C **[12]** Having made the application, the plaintiff proceeded to operate the restaurant notwithstanding that it had not yet obtained a licence from DBKL.

[13] On 11 February 1998 DBKL rejected the plaintiff's application for
D the licence on the ground that the premise was designated for dwelling and not for business. The letter read as follows:

DEWAN BANDARAYA KUALA LUMPUR

JABATAN PELESENAN

E

56 JALAN TUANKU ABDUL RAHMAN

50100 KUALA LUMPUR.

Rujukan Kami: (6)dlm. DBKL. JPL/P&I/3890/11/97

F Tarikh: 11 Februari 1998

Rujukan Tuan:

Tetuan L'escargot Cafe Restaurant (M) Sdn. Bhd.

C1-03, Puncak Prima Condo,

G

Rujukan Kami: (6)dlm. DBKL. JPL/P&I/3890/11/97

Tarikh: 11 Februari 1998

Rujukan Tuan:

H Tetuan L'escargot Cafe Restaurant (M) Sdn. Bhd.

C1-03, Puncak Prima Condo,

DI Cl-03, PUNCAK PRIMA CONDO, JLN SERI HARTAMAS, KUALA LUMPUR

I Dengan hormatnya saya adalah diarah merujuk kepada permohonan tuan/puan tarikh 5 Nov 1997 berkaitan dengan perkara tersebut di atas.

'BERKHIDMAT UNTUK NEGARA'

'BERSEDIA MENYUMBANG, BANDAR RAYA CEMERLANG'

Saya yang menurut perintah,

Sgd.

(HJ. DAUD BIN HJ. MAT)

Jabatan Perlesenan

Dewan Bandaraya Kuala Lumpur

b.p. Datuk Bandar Kuala Lumpur.

s.k. Pengarah,

Jabatan Perancang

Dewan Bandaraya Kuala Lumpur.

(U/P: Encik Soib bin MdNasir)

[14] The plaintiff replied to the letter of rejection by another letter dated 19 February 1998 alleging that the developer had assured them that they had obtained approval of the building plans to use the premises as a business premise. A copy of the approved plans was enclosed. The letter read as follows:

February 19th 1998

HjDaud bin HjMat

Jabatan Pelesenan

Dewan Bandaraya Kuala Lumpur

56 Jalan Tuanku Abdul Rahrnan

50100 Kuala Lumpur.

Tuan Hj. Daud,

Per: Permohonan untuk lesen restoran (ref # 5995/87)

Merujuk kepada perkara di atas, pihak kami ingin menyampaikan permintaan kami supaya permohonan untuk lesen restoran dipertimbangkan semula.

Permohonan kami tidak diterima oleh kerana unit restoran sekarang masih dianggap sebagai sebuah unit kediaman.

Pihak pembangun projek ini telah mengesyorkan pihak kami beberapa kali bahawa unit ini adalah untuk kegunaan restoran. Pelan-pelan yang menunjukkan ini telah pun disampaikan dan diluluskan oleh pihak DBKL. Bersama-sama dengan surat ini adalah dikepilkan salinan pelan berkenaan yang telah diluluskan untuk pertimbangan tuan.

Adalah kepercayaan kami bahawa perkara ini adalah perselesahaan perfahaman di antara pihak pembangun dengan DBKL yang perlu mendapatkan kelulusan DBKL.

A Oleh kerana itu adalah harapan kami bahawa pihak DBKL dapat mempertimbangkan semula permohonan kami untuk lesen restoran.

Sekian, terima kasih.

Yang benar,

B Sgd.

Thiang Siew Eng

Director

L'ESCARGOT CAFE RESTAURANT (M) SDN. BHD.

C C1-05. Puncak Prima Condominium. Jalan Sri Hartamas 17

Sri Hartamas, 50480 Kuala Lumpur

TEL: 653-2081, 653-2084 FAX: 653-2085

D

[15] The plaintiff had earlier on 19 January 1998 soon after operating the restaurant wrote to the project manager of the 1st defendant complaining that it had not been provided with the approved plans to use the premises as a restaurant despite its many reminders. The letter read as follows:

E

January 19th 1998

Mr TC Woo

Senior Project Manager

F Far East Consortium (M) Ltd.

12th Floor, Menara Multi-Purpose

Capital Square

8 Jalan Munshi Abdullah

G 50100 Kuala Lumpur.

Dear T.C

Re: Approved Building Plans for Jabatan Perancang & Kawalan Bangunan (JP & KB)

H Per our conversation on Saturday, January 17th 1998; you re-assured us that everything went well with your meeting with JP & KB on Friday January 16th 1998.

Thus it our assumption that we can be certain our business licence application will not be hindered anymore and that our application will be approved during the next

I board meeting by DBKL.

We wish to draw to your attention that we have met and passed the criteria set by all the other departments (Fire and Health departments) and it is only the JB & KB department that turned down our application due to uncertainties over DBKL's approval of premise usage as a restaurant.

When we signed up to rent the premise from you, you and others (Alan Lau) from your company have repeatedly assured us that the premise is approved for a restaurant business. We had also tried many times since January 1997 to get hold of the approved plans from your company to ensure that there will be no problems in our business licence application.

If this issue is not resolved and the restaurant get summoned for not having a valid licence to conduct business, we will ask that Far Fast Consortium (M) Sdn. Bhd. pay the fine since it is your obligation/duty to ensure that the premise can be used for a restaurant business since you had advertised the premise as suitable for a restaurant business.

Thank you.

Yours sincerely,

Sgd.

Thiang Siew Eng

General Manager

cc DGhana - General Manager

T.T. Yeoh - Director of

L'ESCARGOT CAFE RESTAURANT (M) SDN BHD

C1-05. Puncak Prima Condominium. Jalan Sri Hartamas 17

Sri Hartamas, 50480 Kuala Lumpur.

TEL: 653-2081, 653-2084 FAX: 653-2085

[16] The project manager replied on 2 March 1998 that the 1st defendant developer had actually submitted the plan but DBKL had lost it. It then submitted a fresh plan and the same had been approved on 27 February 1998. The letter read as follows:

EQUATORA SDN. BHD.

12th Floor, Menara Multi-Purpose, Capital Square,

No. 8, Jalan Munshi Abdullah, 50100 Kuala Lumpur.

Tel: 03-2929663 Fax: 03-2920663

EQ/1/858-98

2nd March 1998

L'ESCARGOT CAFE RESTAURANT (M) SDN. BHD.

C1-05, Puncak Prima Condominium

Jalan Sri Hartamas 17

Sri Hartamas

50480 Kuala Lumpur.

ATTN: MS THIANG SLEW ENG

Dear Madam,

APPROVED BUILDING PLANS FROM JPKB

We refer to your letter dated 19th January 1998.

Further to our discussion and also as informed to the Building Management of Puncak Prima and Licensing Department, the building plans ie A930087A, has been approved before the issuance of Temporary Certificate of Fitness. The outlet which was tenanted by your esteemed company is designated for restaurant. We have visited the Licensing Department and explained to them on the issue of building plans which were missing from JPKB's office while they were shifting from DBKL building to Wisma Bandar. JPKB's officer were assuring us that everything would be in good manner and it is a matter of time before they could sought things out. However, on the 13th February 1998, the TA from the officer's office called to explain on the missing plans and we have got no choice but to re-prepare four (4) sets including 'linen' for a fresh submission. This preparation took the architect some days to prepare as it involved colouring the changes (see the amended full set which were provided to the Building Management office). The plans were finally submitted on 24th February 1998. We have managed to obtain the approvals on 27th February 1998 and the full approved sets is in our office. We have photostated a copy of your area for your further perusal. We regret on the inconvenience caused and would appreciate if you could understand the overall scenario.

Thank you.

Yours faithfully,

EQUATORA SDN. BHD.

Sgd.

WOO THIN CHOY

Senior Project Manager

/sy

[17] Sometime in February 1998 officers from DBKL visited the plaintiff's premise and demanded that the plaintiff produced the requisite licence to operate the restaurant. Subsequently the plaintiff reminded the 1st defendant of the need to expedite the approval of the building plans to be used as restaurant emphasising the urgency of the matter. The letter read as follows:

February 13th 1998

Mr TC Woo

Senior Project Manager

Far East Consortium (M) Ltd.

12th Floor, Menara Multi-Purpose

Capital Square

8 Jalan Munshi Abdullah

50100 Kuala Lumpur.

Dear TC

Re: Approved Building Plans for Jabatan Perancang & Kawalan Bangunan (JP & KB)

DBKL was here recently to check on the premise and requested for the premise license.

Since you assured us that you have resolved the building plans approval with Jabatan Perancang & Kawalan Bangunan, kindly tell us who we should contact to follow up on our application.

This matter cannot be delayed anymore as the summon will be issued if the premise license is not in order.

If this issue is not resolved and the restaurant get summoned for not having a valid license to conduct business, we will ask that Far East Consortium (M) Sdn Bhd pay the fine since it is your obligation/duty to ensure that the premise can be used for a restaurant business as you had advertised the premise as suitable for a restaurant business.

Thank you.

Yours sincerely,

Sgd.

Thiang Siew Eng

General Manager

cc D Ghana - General Manager

TT Yeoh - Director of

L'ESCARGOT CAFE RESTAURANT (M) SDNBHD

C1-05. Puncak Prima Condominium. Jalan Sri Hartamas 17

Sri Hartamas, 50480 Kuala Lumpur.

TEL: 653-2081, 653-2084 FAX: 653-2085

[18] On 10 March 1998 the plaintiff wrote to DBKL to request them to reconsider issuing it with the licence considering that the developer had assured them that the premises can be used for business purpose. The letter read as follows:

March 10th 1998

Encik Soib bin Md. Nasir

Jabatan Perancang

Dewan Bandaraya Kuala Lumpur.

Encik Soib bin Md Nasir,

Per: Permohonan untuk lesen restoran (ref ## 5995/87)

Merujuk kepada perkara di atas, pihak kami ingin menyampaikan permintaan kami supaya permohonan untuk lesen restoran dipertimbangkan semula.

Permohonan kami tidak diterima oleh kerana unit restoran sekarang masih dianggap sebagai sebuah unit kediaman.

Pihak pembangun projek ini telah mengesyorkan pihak kami beberapa kali bahawa unit ini adalah untuk kegunaan restoran. Pelan-pelan yang menunjukkan ini telah pun disampaikan dan diluluskan oleh pihak DBKL. Bersama-sama dengan surat ini adalah dikepilkan surat dari pihak pembangun projek dan salinan pelan berkenaan yang telah diluluskan untuk pertimbangan tuan.

Adalah kepercayaan kami bahawa perkara ini adalah perselesahaan perfahaman di antara pihak pembangun dengan DBKL yang perlu mendapatkan kelulusan DBKL.

Oleh kerana itu adalah harapan kami bahawa pihak DBKL dapat mempertimbangkan semula permohonan kami untuk lesen restoran.

Sekian, terima kaslh.

Yang benar,

tt

Thiang Siew Eng

Director

L'ESCARGOT CAFE RESTAURANT (M) SDN. BHD.

C1-05, Puncak Prima Condominium. Jalan Sri Hartamas 17

Sri Hartamas, 50480 Kuala Lumpur.

TEL: 653-2081, 653-2084 FAX: 653-2085

[19] On 19 March 1998 the licensing board officers of DBKL visited the plaintiff's premise and verbally gave the plaintiff 3 days to resolve the licence issue failing which an appropriate action would be taken either to close it down or to allow a compound to be paid.

[20] The plaintiff then on the same day notified the 1st defendant of the event that transpired by a letter dated 19 March 1998 which read as follows:

March 19th 1998

Mr TC Woo

Senior Project Manager

Far East Consortium (M) Ltd.

12th Floor, Menara Multi-Purpose

Capital Square

8 Jalan Munshi Abdullah

50100 Kuala Lumpur.

Dear TC,

Re: Business Licence

We just had a visit from the licencing board of DBKL this morning, March 19th 1998. They have given us three days to resolve the issue with Jabatan Perancang or else there are two choices: A: Continue with running the business and get compounded or B: stop business until the issue is settled.

I had gone to Jabatan Perancang yesterday to try to resolve the issue. I showed them the copy of the building plan and was told that it would be resolved much faster if I could show them the original building plan instead.

I would like to get the original building plans to show DBKL in order to settle this matter immediately.

Once again, I must stress to you that since this issue arose not from L'escargot Cafe Restaurant (M) Sdn. Bhd's wrong doing, any compound from DBKL will be forwarded to you to be settled. And if we have to stop business, you will bear the equivalent of my average daily sales.

Thank you.

Yours sincerely,

Sgd

Thiang Siew Eng

General Manager

cc DGhana - General Manager

TT Yeoh - Director of

L'ESCARGOT CAFE RESTAURANT (M) SDN BHD

C1-05. Puncak Prima Condominium. Jalan Sri Hartamas 17

Sri Hartamas, 50480 Kuala Lumpur.

TEL: 653-2081, 653-2084 FAX: 653-2085

[21] On 27 April 1998 and 5 May 1998 meetings were held between the plaintiff and the second defendant's representatives wherein matters arising from the licensing were raised. The minutes of the meeting indicate that second defendant's employee one Mr. Gnana had agreed to meet up with DBKL 'to find out any problems with the building plans'.

[22] Eventually DBKL issued the plaintiff a notice dated 5 August 1998 to cease operation of the restaurant. Plaintiff left the premises in the same month.

THE CASE FOR THE DEFENDANTS

[23] The essential provisions that bind the parties are as follows:

1. The tenancy agreement Clause 6.05 — this clause clearly states that the tenant must be in possession of a business licence before they commence operation of their restaurant. This was not done. They went on to operate the restaurant without a licence and this is a condition precedent and a mandatory requirement on the part of the tenant to comply.
2. At the time when the plaintiff paid the deposit he was given a skeletal agreement essentially in paragraph m at p 003 Summary of Facts — all retailers must have the relevant licence for their trade. This is solely the responsibility of the retailers on 23 May 1996 when they paid the deposit of RM3077. The plaintiff was operating the premises illegally as they were not in possession of a licence to operate the restaurant.
3. Further the broad terms of the lease at p e 007 Summary of Facts paragraph m provides as follows:

> 'All retailers must have obtained the relevant licence for their trade which is solely the responsibility of the retailers.'

4. The defendants' premise which was let to the plaintiff was at all material time approved for a housing accommodation and with facilities for some commercial use at the ground and 1st floor of the building. This is clearly shown in the approved building plan dated 1993. In this plan the demised premise was shown as 'lounge area and kitchen'. Therefore the defendants had duly obtained the building plan for commercial use of that particular area where the restaurant was being operated.
5. Now see Supplementary Bundle of Defendants dated 6 February 2006 where the amended approved plan shows the defendants had duly obtained the amended plan which indicates that the area

shown in previous plan dated 1995 has been amended to 'restaurant' on 27 February 1998. This is clearly shown on this amended plan.

6. The defendants initially submitted the plan for amendment in 1997 (after the tenancy contract came into force which later was formally executed on 1 Disember 1997 in writing). Proof of submission see Annexure E in Summary of Facts — letter from defendants' agent Equatora Sdn Bhd explaining that the plan that was submitted was lost and subsequently they had forwarded to DBKL a fresh plan for their amendment of the word 'lounge' to 'restaurant'.

Submits: 'Lounge' here means an area where food is served by the kitchen next to the lounge as provided in the plan.

The defendants had informed the plaintiff vide letter dated

2 March 1998 that the amended approved plan indicating the use of the word 'lounge' had been amended to 'restaurant' can be collected at the defendants' office. Thereafter the plaintiff acted and forwarded the approved plan to DBKL by letter dated 10 March 1998 seeking the issuance of a licence from DBKL to operate the restaurant.

Therefore on 27 February 1998, the defendants had successfully obtained the amended approved plan and the plaintiff had made use of this amended plan to submit to DBKL. The defendants had therefore discharged their obligation under the tenancy agreement.

The notice by DBKL dated 5 August 1998 informing the plaintiff that it had to stop operating the restaurant by reason that the plaintiff had no development order and had not changed the use of the space as a restaurant did not make sense. The defendants had obtained the development order way back on 14 June 1993 and had amended the plan to restaurant on 27 February 1998.

Earlier DBKL also issued a notice dated 11 February 1998 informing the plaintiff that they can be charged under the Bye-Laws of DBKL as the use of the space shall be for a residential purpose and not for a commercial use. At this point of time the area designated 'lounge' which should therefore covers commercial usage. This notice also did not make sense.

8. By reason of the above the plaintiff ought to have commenced business only after obtaining the relevant licence after 27 February 1998 if that was the requirement by DBKL. However, prior to that they have already commenced business and thus was in

A breach of the tenancy agreement and the Bye-Laws governing the operation of the business of a restaurant.

REPLY BY COUNSEL FOR THE PLAINTIFF

B **[24]** The second approved plan as amended now states 'restaurant' at the area where previously stated as 'kitchen and lounge'. This amended plan was approved only on 28 May 1999 (see the word 'Diluluskan pada 28 May 1999'). Therefore at the time the plaintiff terminated the contract in August 1998 there was not in existence an approved plan for restaurant. That was the C reason why application for licence was rejected by letter on 11 February 1998.

[25] The original approved plan of the premises was stated to be for a D 'lounge and kitchen' whereas the amended approved plan obtained by the defendants later after re-submission was for a 'restaurant'. A lounge is a place for people to relax and for waiting purposes. See Oxford Advanced Learner's Dictionary. Whereas kitchen is a place where meals are prepared. Restaurant on the other hand is a place where you can buy and eat a meal. See same E dictionary. Properly therefore the defendants should be in possession of an approved licence from DBKL to operate a restaurant and not a lounge and kitchen when the plaintiff took up the tenancy. That would be the reason why the defendants deemed it necessary to apply for amendment of the approved plan from 'lounge and kitchen' to 'restaurant'. There is nothing in F the skeletal agreement (AB pp 6–8) nor in the tenancy agreement (AB pp 12–28).

[26] Even if it is the fault of DBKL for not approving the licence to the plaintiff it is due to something within the control of the defendants the G plaintiff being a tenant. It is the defendants' duty to ensure that the premises is approved for use as a restaurant before letting it out to the plaintiff.

[27] The advertisement of the defendants calling for tenants to apply for the tenancy to operate a 'restaurant' (AB p 40). When the plaintiff entered H into the tenancy agreement with the defendants by relying on the advertisement and subsequently applied for a licence to operate a 'restaurant', DBKL rejected the plaintiff's application on the basis that the premises was not approved for a 'restaurant'.

I REPLY BY COUNSEL FOR THE DEFENDANTS

[28] Essentially plaintiff failed to comply with the condition precedent that they must have a business licence before operating the restaurant and this is a mandatory requirement under the agreement. It is also a statutory

requirement prior to the commencement of any business in particular the business of the plaintiff they require a licence from DBKL before they commenced the operation. In this regard they expended time and money to operate the business even without first obtaining the licence. This is a breach of the contractual condition and also of the regulation of the authority of DBKL requiring a licence before operating a business.

[29] The rejection by DBKL of the plaintiff's application for business licence was wrong as the grounds for rejection stated in the letter dated 5 August 1998 is contrary to their own approved development order dated 14 June 1993.

FINDINGS AND DECISION

[30] The dispute can be resolved first by ascertaining the term and condition of the tenancy agreement entered into by the parties. Having determined the term and condition it would then be necessary to apply the appropriate law of obligations to determine whether the said agreement had been breached.

[31] Both the parties were clearly ad idem that:

(i) The space (by whatever name it is called) is to be let out by the defendants to the plaintiff to be used by the plaintiff to operate its restaurant business, and that to operate that business the plaintiff must possess a business licence from the relevant authority.

(ii) By taking up the tenancy of the restaurant, the plaintiff was required to obey all rules and regulations prescribed by the relevant licensing authority (in the present context, the Dewan Bandaraya or DBKL) respecting the operation of the restaurant and that the plaintiff would have to apply for that licence upon signing the agreement. This is clear from Section 6.05 of the tenancy agreement (supra) that the parties signed. This operative passage of Section 6.05 read as follows:

> The Tenant shall comply with observe at all times all such rules, regulations and conditions imposed by the relevant authorities in respect of such licence permit and consent (hereinafter referred to as 'the said Licence') granted for the operation of the business by the Tenant. The Tenant shall apply for including the renewal of the said Licence …

[32] A contract is essentially a bargain with commercial elements — an exchange of something for something. The plaintiff had entered into a bargain on the term and condition that the place could be used to operate a licensed restaurant.

A **[33]** The plaintiff has the right to what it bargained for regardless of whether DBKL had rightly or wrongly refused to approve the space as a restaurant. The fact that DBKL may have been at fault in failing or refusing to designate the space as a 'restaurant' and had on that ground denied the plaintiff the business licence, is therefore irrelevant.

B

[34] It follows therefore that the defendants as the landlord of the demised space (by whatever designation it is called) is obliged under the agreement to ensure that that space can be used and was approved to be used by the plaintiff to operate a restaurant.

C

[35] Whereas obtaining a licence from DBKL to operate the restaurant as a business was the obligation of the plaintiff as tenant, the obligation of the defendants as landlord was to ensure that the plaintiff was able to use that space for its restaurant business without let or hindrance. This envisages that

D the space should have been pre-approved by DBKL for use as a restaurant before it was let out to the plaintiff.

[36] It is clear from the notice that the plaintiff received from DBKL dated

E 5 August 1998 following the plaintiff's application for a business licence from DBKL to operate the restaurant, that DBKL had not approved the space for use as a restaurant. Consequently, the plaintiff was unable to use that space as a restaurant. The defendants had therefore breached a condition of the tenancy agreement in failing to provide the plaintiff with the space for the

F purpose to operate the restaurant.

[37] The fact that the defendants had failed to provide a space that the plaintiff could use to operate a licensed restaurant constitutes a breach of a condition of the tenancy agreement (implied or otherwise) on the part of the

G defendants. A breach of a condition (as opposed to a mere breach of a warranty) of a contract goes to the very root of the contract to allow the plaintiff to discharge the contract (the tenancy agreement in this case) and to claim damages.

H **[38]** The plaintiff is at liberty to terminate the agreement and claim damages from the defendants when it received the notice from DBKL dated 5 August 1998 advising that it had to vacate the place by reason that the space had not been approved as a restaurant.

I **[39]** The plaintiff's claim is allowed with costs. Damages are to be assessed by the Registrar with the appropriate interest to be imposed at his discretion.

[40] There is a counterclaim to be disposed of. It is clear there could not be any defence as to the plaintiff's liability to pay the rental for the period that

they had occupied the space as a restaurant and to pay the maintenance charges for the same period. The defendants' counterclaim should therefore be allowed with costs in respect of the arrears of rental and maintenance charges remaining unpaid up to the time the plaintiff vacated the demised space. The quantum is to be determined by the Registrar.

Order accordingly.

Reported by Sally Kee